In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1291

BILLY G. SAYNE, PETITIONER

v.

EUGENE S. SHIPLEY, CHIEF, POLICE DIVISION, CANAL ZONE GOVERNMENT AND GADDIS WALL, CAPTAIN, BALBOA DISTRICT POLICE COMMANDER, CANAL ZONE GOVERNMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. 7-19) is reported at 418 F.2d 679.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. Mr. Justice Black extended

the time in which to file a petition for a writ of certiorari to and including March 9, 1970. The petition was filed on March 7, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Article XVI of the 1903 Treaty between the United States of America and the Republic of Panama providing for extradition between the Canal Zone and the Republic of Panama has been superseded by a subsequent treaty.

2. Whether an executive determination of extraditability by the Governor of the Canal Zone, subject only to judicial review by habeas corpus, violates due process.

TREATY INVOLVED

Article XVI of the treaty between the United States and Panama, signed November 18, 1903, provides (33 Stat. 2238-2239):

> The two Governments shall make adequate provision by future agreement for the pursuit, capture, imprisonment, detention and delivery within said zone and auxiliary lands to the authorities of the Republic of Panama of persons charged with the commitment of crimes, felonies or misdemeanors without said zone and for the pursuit, capture, imprisonment, detention and delivery without said zone to the authorities of the United States of persons charged with the commitment of crimes, felonies and misdemeanors within said zone and auxiliary lands.

STATEMENT

By letter dated February 12, 1968, Fernando Eleta A., Minister of Foreign Relations, Republic of Panama, requested Major General Walter P. Leber, Governor of the Canal Zone, to extradite to Panama petitioner, a lance corporal in the United States Marines stationed in the Canal Zone (A. 25).[1] Attached to the letter was a copy of an "Auto de Enjuiciamiento", analogous to an indictment, of the Eighth Circuit Court of Panama, accusing petitioner of armed robbery of a Panama City drug store, and ordering his arrest (A. 26-34).

The extradition request was made pursuant to Article XVI of the 1903 Treaty between the United States and the Republic of Panama as implemented by an executive order of the Canal Zone Governor dated September 19, 1906 (A. 28). The procedures for surrender originally set forth in the executive order have now been approved by Congress and are included in Sections 5081-5092 of Title 6 of the Canal Zone Code, 76A Stat. 554.

Following the requisite procedure, the Governor of the Canal Zone determined that petitioner was extraditable and caused a warrant to be issued for his arrest. After being taken into custody, petitioner filed a petition for a writ of habeas corpus in the district court (A. 2-5) and a hearing was subsequently held. At the hearing, petitioner admitted that he was the individual sought by the Republic of Panama

[1] "A." refers to the petitioner's appendix filed with the court of appeals.

(A. 112-116, 142-143) and that a crime had been charged in that country (A. 108). The district court dismissed the petition and quashed the writ of habeas corpus (A. 49-51).

The court of appeals affirmed the judgment, holding that extraditability was governed by Article XVI of the 1903 Treaty as implemented in the Canal Zone Code and that due process had not been violated on account of the determination of extraditability by the Governor of the Canal Zone, subject to judicial review by habeas corpus.

ARGUMENT

1. Petitioner contends that extradition between the Canal Zone and the Republic of Panama is not governed by Article XVI of the 1903 Treaty because that article had been superseded by a 1904 Treaty relating to general extradition between the United States and Panama. For the reasons stated by the court of appeals (Pet. App. 10-14), upon which we rely, it is clear that Article XVI of the 1903 Treaty was not superseded and was properly applied by both courts below.

2. Petitioner was not denied due process where the question of his extraditability was initially determined by the Canal Zone Governor and was subsequently reviewed, after a full hearing, by the district court in a habeas corpus proceeding.

Extradition proceedings from the Canal Zone to Panama are exempted by Section 4981 of Title 6 of the Canal Zone Code from the provisions of 18 U.S.C. 3184 which provide for initial judicial determina-

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tion of extraditability in most international extradition proceedings. Only in the Canal Zone is the initial determination made by the executive. Such a procedure, however, is clearly sanctioned by the Constitution.

Until 1848, when the predecessor of § 3184 was adopted, 9 Stat. 302, there were no statutory provisions for a judicial hearing prior to executive extradition of fugitives pursuant to treaty obligations. Under the Jay Treaty of 1794 between the United States and Great Britain, the first extradition treaty to which this country was a party, ultimate responsibility for extradition rested with the chief executive. I Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776-1909*, 590. Although Congress had taken no action to implement the treaty, President John Adams in 1797 ordered the surrender of one Jonathan Robbins to British agents. The heated debate over the propriety of the President's action which ensued was concerned not with the constitutionality of executive extradition, but with the authority of the President to act pursuant to treaty in the absence of implementing congressional legislation. Most of those joining the debate, including John Marshall, conceded that Congress could allocate extradition responsibility either to the judiciary or to the executive, subject to habeas corpus. Hurd, *Habeas Corpus*, pp. 582-593 (2d ed. 1876).

Congress has done no more than choose between two viable alternatives in adopting the present Canal Zone extradition procedures.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1970.

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